No. 7198

In the United States Circuit Court of Appeals for the Ninth Circuit

FIFTH STREET BUILDING, A CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
JOHN G. REMEY,
Special Assistants to the Attorney General.

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CITATIONS

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OPINION BELOW

The only previous opinion is that of the United States Board of Tax Appeals (R. 60–65), which is reported in 24 B.T.A. 876.

JURISDICTION

This appeal involves taxes for the years 1921 and 1926 in the amounts of $16,710.96 and $1,142.72, respectively, and is taken from an order of redetermination entered March 16, 1932 (R. 113–114). The appeal is brought to this Court by petitions for review filed September 13, 1932 (R. 114–135), pursuant to the provisions of the Revenue Act of

1926, c. 27, 44 Stat. 9, 109–110, Sections 1001, 1002, and 1003, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTIONS PRESENTED

1. On May 18, 1921, petitioner issued to an individual all its capital stock, except three shares, to acquire a contract for lease. The question is whether, under Section 331 of the Revenue Act of 1921, there may be included in petitioner's invested capital for 1921 the value of the contract on the date the previous individual owner acquired it or only its cost to him.

2. Whether under the applicable sections of the statute petitioner is entitled to a deduction in 1926 for depreciation in the value of a leasehold. The answer to this question depends upon whether or not the previous owner of the leasehold acquired it as a gift.

3. Whether a new issue raised for the first time under Rule 50 of the Board's Rules of Practice may be reviewed in this Court.

STATUTES INVOLVED

They will be found in the appendix, *infra*, pp. 24–27.

STATEMENT

The facts found by the Board are as follows (R. 50–60):

On November 1, 1920, an agreement was entered into between Gladys Bilicke and A. B. C. Dohr-

mann, first parties, and W. A. Faris and R. M. Walker, second parties, in which the first parties, as executors of the Estate of A. C. Bilicke, deceased, agreed to cause to be executed a lease of certain real property in Los Angeles, California, the same being a portion of Lots 4 and 5 in Block 14 of the Ord Survey, as follows (R. 50–52):

> AGREEMENT, made as of this 1st day of November 1920, by and between GLADYS BILICKE and A. B. C. DOHRMAN, as first parties, and W. A. FARIS AND R. M. WALKER, as second parties.
>
> The first parties represent that they are the Executors of the Last Will and Testament of A. C. Bilicke, deceased, and that said estate owns real property in the City of Los Angeles, State of California, substantially described as follows:
>
> [Description omitted]
>
> 1. The first parties agree that they will forthwith cause a corporation to be organized under the laws of the State of California, having some suitable name, and that they will immediately institute and take such proceedings as may be permitted by law to cause the real property to be distributed pursuant to the said Will and to be acquired by said corporation, or by said corporation and said Gladys Bilicke, to the end that Gladys Bilicke, one of the said first parties, individually, and as the guardian of her three minor children, shall own all of the issued

stock of said corporation, and that said corporation, or said corporation and said Gladys Bilicke, may make a valid lease of said real property for the term of ninety-nine years. Said first parties agree that they will use every endeavor to promptly accomplish the above and foregoing results.

2. The second parties agree that they will cause a corporation to be organized under the laws of the State of California having some suitable name, for the purpose of leasing the said real property for a term of ninety-nine (99) years commencing January 1, 1921. And the first parties agree that when the said real property shall be acquired by the corporation to be organized by them in accordance with the provisions of this agreement, they will cause said corporation or said corporation and said Gladys Bilicke, to execute, as Lessor, an indenture of lease substantially in the form of the document attached hereto and marked "A." The second parties agree that they will thereupon cause the said corporation to be organized by them, as aforesaid, to execute, as lessee, the said indenture of lease, and that they, as individuals, will at the same time execute in favor of the lessor a guaranty substantially in the form of the document attached hereto and marked "B." It is agreed between the parties that at the time of the execution of the indenture of lease marked "A", there shall also be executed by the parties thereto a supplemental agreement substantially in

> the form of the document attached hereto marked "C."
>
> * * * * *

The proposed lease provided, among other things, that the lessee should pay a yearly rental of $50,000, throughout the term of the lease, should pay all taxes, etc., should erect at its own cost a modern steel frame or reinforced concrete fireproof store and loft building, having a basement and at least eight sories, such building to cover at least the area covered by the old buildings then on the premises. It also provided that the lessee should have the right to encumber, hypothecate, or assign the leasehold interest, subject to the rights of the lessor. It further provided that in the event of default by the lessee for a period of 90 days of any of its obligations under the lease the lessor should have the right to terminate the lease.

Below and following the signatures of Gladys Bilicke and A. B. C. Dohrmann, W. A. Faris, and R. M. Walker, on the agreement for lease, the following appears (R. 53):

> NOVEMBER 1, 1920.
>
> It is further agreed that in consideration of the cancellation as of December 31, 1920, of the present lease held by the second parties on the above-described property, the second parties will pay to the first parties Thirty Thousand Dollars ($30,000) on December 31, 1920, and in the event of a failure to execute the proposed lease annexed

> hereto and marked "A", the said Thirty Thousand Dollars ($30,000) shall be returned to the second parties with interest at the rate of six per centum (6%) per annum, in which said event said present lease shall remain in full force and effect.
>
> GLADYS BILICKE.
> A. B. C. DOHRMANN.
> W. A. FARIS.
> R. M. WALKER.

Prior to November 1, 1920, three leases, all dated December 27, 1911, together covering the same property described in the contract for lease of November 1, 1920, had been executed by A. C. Bilicke and Muse, Faris & Walker Company, a corporation. These leases provided for an aggregate rental of $96,000 and the term of each lease expired October 31, 1922. On December 22, 1916, these leases were assigned by Muse, Faris & Walker Company, a corporation, to R. M. Walker and W. A. Faris, doing business under the firm name of Faris-Walker, The 5th Street Store.

November 2, 1920, the following letter was signed by Faris and Walker and delivered to C. J. Milliron (R. 54):

> In consideration of your assuming all of the duties and obligations imposed upon us by reason of our contract to execute a lease dated November 1st, 1920, between Gladys Billicke and A. B. C. Dohrman and ourselves as second parties, a copy of which agreement is attached, we hereby give and

assign to you all our right, title, and interest in said agreement, it being understood that you are to assume all of our obligations either directly or indirectly imposed as a result of this agreement.

On the same date the following letter was signed by C. J. Milliron and delivered to W. A. Faris and R. M. Walker (R. 54):

Your gift to me today of your contract of November 1st to execute a lease on the premises generally known as the "Billicke" properties, is hereby accepted and I agree to assume all your obligations thereunder and to hold you free and clear of any liabilities as a result thereof.

I will cause to be prepared an assignment of this contract executed in due form for the purpose of record.

(Only the bodies of the foregoing letters are set forth.)

On November 1, 1920, Faris and Walker paid $30,000 to the Estate of A. C. Bilicke, deceased, and received a receipt therefor as follows (R. 54–55):

Received from Faris-Walker, a partnership composed of W. A. Faris and R. M. Walker, the sum of thirty thousand dollars ($30,000) as a bonus for the cancellation of three certain leases dated December 27, 1911, between A. C. Billicke, lessor, and Meuse, Faris-Walker Company, a corporation, as lessee, under which said leases Faris-Walker now occupy the premises described therein facing on Broadway and Fifth Street, in the

city of Los Angeles, California, which said payment is received on account of cancellation of said lease, in accordance with the agreement entered into November 1, 1920, between Gladys Billicke and A. B. C. Dohrman, as executors of the will of Albert C. Billicke, deceased, and W. A. Faris and R. M. Walker.

Dated Los Angeles, California, this 31st day of December 1920.

Signed "Estate of Albert C. Billicke, deceased, by Arthur C. Hurt, Attorney for the Executors."

On January 2, 1921, Clark J. Milliron, as first party, and W. A. Faris and R. M. Walker, copartners, doing business under the firm name and style of Fifth Street Store, as second parties, executed a lease wherein and whereby the premises described in the agreement for lease of November 1, 1920, were leased to Faris and Walker from January 1, 1921, to December 31, 1921, and for such longer time thereafter as the parties shall agree at a rental of $150,000 payable in twelve equal installments of $12,500. It further provided that Faris and Walker were to pay in addition to the rental, all taxes and keep the premises fully insured.

On January 15, 1921, a corporation was organized under the laws of the State of California, with a corporate name of Fifth and Broadway Investment Company and the stock thereof was acquired and owned by Gladys Billicke, individually, and as guardian of her three minor children.

On March 30, 1921, C. J. Milliron caused to be organized under the laws of the State of California, a corporation known as Fifth Street Building with an authorized capital stock of $1,500,000, divided into 15,000 shares of the par value of $100 each. This corporation is the petitioner in this proceeding.

Minutes of special meeting of stockholders of petitioner held May 18, 1921, contain the following resolution (R. 56):

> (Preamble setting forth the history of the transaction up to that time omitted.)
> RESOLVED: That the Board of Directors of Fifth Street Building, is hereby authorized and directed to purchase from said Clark J. Milliron all his right, title, and interest in and to said contract for lease between Gladys Billicke and A. B. C. Dohrman as lessors and W. A. Faris and R. M. Walker as lessees, for and in consideration of the sum of $640,000, to be paid to said Clark J. Milliron in capital stock of this corporation at its par value, and as lessee to execute and enter into the aforesaid lease with Fifth & Broadway Investment Co., a corporation, as lessor.

A further resolution was adopted authorizing the board of directors to execute the lease pursuant to agreement for lease. At the time of this meeting three shares of the capital stock of petitioner had been subscribed for by Clark J. Milliron, J. D. McLeod, and W. M. Pargellis, respectively.

On May 18, 1921, C. J. Milliron and wife by agreement in writing sold, transferred, and set over to Fifth Street Building, the petitioner, all the right, title, and interest of every kind and nature in and to the agreement for lease of November 1, 1920, and the lease to be entered into between Fifth and Broadway Investment Company, as lessor, and Fifth Street Building, as lessee, pursuant to the agreement of lease of November 1, 1920.

On May 20, 1921, an agreement of guaranty, with copy of the lease attached, was entered into between Fifth and Broadway Investment Company, as lessor, and W. A. Faris and R. M. Walker, as guarantors, providing that (R. 57):

> WHEREAS, it is to the benefit and advantage of the Guarantors, that said Lease should be entered into by said Lessor; and
>
> WHEREAS, said Lessor would not enter into said Lease save for the guarantees and obligations hereinafter set forth and assumed by said Guarantors with respect to said lease;

Faris and Walker guaranteed the full and faithful performance by the lessor of each and all the terms and provisions relating to the construction of the new buildings upon the demised premises and the faithful performance by the lessor of each and every term, condition, provision, and obligation contained in the lease and to be performed by the lessor; provided, however, that all obligation of Faris and Walker, as guarantors, should cease upon the

full completion of and payment for the new buildings.

On May 20, 1921, following the execution of guaranty agreement, a lease in the form attached to the agreement for lease of November 1, 1921, was entered into between Fifth and Broadway Investment Company and the petitioner, Fifth Street Building, for an annual rental of $50,000, payable in four equal installments, the lessee to pay all taxes. This lease is in full force and effect and petitioner has been at all times since its execution the owner thereof.

The lease, on January 1, 1921, and May 20, 1921, had a value of $640,000.

On March 1, 1922, a lease was entered into covering the same premises between Fifth Street Building and Faris-Walker, a California corporation, for a term of thirty years beginning on March 1, 1922, and ending February 28, 1952, unless sooner ended in accordance with the provisions of the lease, for a net monthly rental of $12,500 for March, April, and May in 1922, and a net monthly rental of $13,333 for each month of the remainder of the term. In addition, the lessee was required to pay the taxes paid by the lessor pursuant to terms of the ground lease and also all settlements paid by lessor to complete the building and improvements then upon the premises or thereafter to be constructed and to insure them against loss by fire as required by the terms of the ground lease, the

ground lease being the lease of May 20, 1921, between Fifth and Broadway Investment Company and Fifth Street Building.

Clark J. Milliron, counsel for petitioner, and C. J. Milliron, to whom the letter of Faris and Walker, dated November 2, 1920, is addressed, are one and the same person. He represented Faris and Walker as counsel prior to and at the time of the execution of the agreement for lease of November 2, 1920, and until about 1924 or 1925.

Muse, Faris and Walker, later Faris and Walker, have occupied all or part of the premises described in the contract for lease since about 1906, and continued doing so even during the construction of the new building as provided for in the lease, vacating the old building and moving into parts of the new building as completed from time to time.

Ever since February 10, 1922, the total issued and outstanding shares of capital stock of petitioner has been and is 6,713 shares.

In the deficiency letter dated April 19, 1926, relating to the asserted deficiency in income and profits taxes for 1921, the Commissioner stated as follows (R. 59–60):

> The adjustment made by the examining officer allowing amortization of ground rent in the amount of $2,000.00 has been eliminated for the reason that no value has been established on the agreement for a lease, which was paid in for stock, since such agreement had no value and was not enfor-

cible in the hands of anyone but the original parties thereto.

* * * * *

The elimination from invested capital of $483,945.20 shown in Schedule H of your return as the prorated amount of stock issued for lease is in accordance with Section 331 of the Revenue Act of 1921 which provides that for invested capital purposes such an asset may be included only at its cost to prior owner, which in this case was nothing.

The petitioner filed its income returns for the years 1921, 1923, and 1926, within the time provided by law and paid taxes thereon in the amounts of $16,361.81, $2,212.98, and $3,051.01, respectively.

The Board allowed no addition to invested capital for 1921 because of the contract for lease and allowed no deduction for depreciation in the value of the leasehold for 1926. The petitioner appeals from this determination.

SUMMARY OF ARGUMENT

The value of the contract for lease acquired by the petitioner on May 18, 1921, in exchange for all its stock except three shares may not be included in petitioner's invested capital for 1921 because such inclusion is prohibited under Section 331 of the Revenue Act of 1921, which provides that the value of the property exchanged for stock is limited to the cost to the preceding owner. The cost to the preceding owner in this case was nothing.

The basis for the computation of a deduction for depreciation in the value of the lease for 1926 would be the value of the lease on the date it was received by Milliron only if it was received by him as a gift.

The transaction bears no semblance of a gift. It was no doubt based upon some business expediency thought necessary by the parties and the interests of all were carefully guarded. Faris and Walker assigned their contract to Milliron for the express consideration of the assumption by him of their obligations under the contract. A substantial benefit flowed to the alleged donors. There is in this neither direct evidence of a gift nor motive or other circumstance from which a gift could be inferred.

The third question here raised by the petitioner is a new issue urged for the first time at the hearing on the recomputation of the deficiency under Rule 50 of the Board's Rules of Practice. It is well settled that under such circumstances the question may not be raised on appeal.

ARGUMENT

I

The par value of the stock issued for a contract for lease may not under the applicable statute be included in petitioner's invested capital for 1921

Petitioner seeks to include in invested capital $640,000, representing the par value of stock issued for a contract for lease. Respondent has disallowed the item in its entirety and relies upon the

provisions of Section 331 of the Revenue Act of 1921 to sustain his action.

The term invested capital is a statutory concept. Congress has arbitrarily determined what may be included in the computation of the taxpayer's invested capital. *LaBelle Iron Works* v. *United States,* 256 U.S. 377. In addition to the restrictive provisions of Section 326 of the Act, further limitations to prevent inflation or appreciation of values are prescribed in Section 331. This Section relates to invested capital in the case of reorganizations and changes of ownership of property after March 3, 1917, and provides "That if such previous owner was not a corporation, then the value of any asset so transferred or received shall be taken at its cost of acquisition (at the date when acquired by such previous owner) * * *."

On November 1, 1920, the partnership of Faris and Walker entered into an agreement with the executors of the Estate of Bilicke providing in substance that (1) the Estate of Bilicke would organize a corporation, transfer the title of certain real estate to it and cause such corporation to execute a 99-year lease to the partnership or its nominee and (2) Faris and Walker would organize a corporation to execute the lease as lessees, performance by said corporate lessee to be guaranteed by the partnership. Faris and Walker on November 2, 1920, assigned all their right, title, and interest in this agreement to one Milliron for no money consideration. The Bilicke interests organized the

Fifth and Broadway Investment Company, a corporation, on January 15, 1921, and on March 30, 1921, Milliron organized the Fifth Street Building, the present petitioner. On May 18, 1921, the stockholders of the petitioner authorized the purchase of the agreement of November 1, 1920, from Milliron and paid him for the agreement 6,400 shares of the 6,403 shares of petitioner's outstanding stock.

Clearly the statute is here applicable. The transaction occurred after March 3, 1917. To Milliron, the previous owner, the cost of acquisition was nothing since he paid no consideration for the assignment to him of the agreement for lease. An interest or a control of more than 50% of the property remained in him. It is submitted that petitioner is not entitled to any addition to invested capital on account of the acquisition of the contract because the contract cost the previous owner nothing.

That the cost to the previous owner is the determinative factor has been held in *Conrad & Co.* v. *Commissioner,* 50 F. (2d) 576 (C.C.A. 1st). In that case a partnership organized a corporation on November 1, 1917, and transferred to it all the tangible assets for the entire capital stock. At the same time the partnership assigned to the corporation its trade marks and good will in consideration of the corporation's assuming the partnership's indebtedness. The question was at what value the intangibles could be included in invested capital.

The court held that Section 331 applied and said (p. 578):

> The change in the ownership of the business to Conrad & Company, Inc., in 1917 was either a reorganization or a change in ownership, where the entire control of the business remained in the same persons. The test, therefore, in determining the invested capital of the corporation for the years mentioned, was the cost of the intangibles to the partnership and not its cash value. Congress, in this section, has arbitrarily fixed the cost of property to the original owner acquired in this manner as the basis for determining its effect upon the invested capital.

A similar conclusion was reached in *Northwestern Motor Car Co.* v. *Commissioner,* 45 F. (2d) 357 (C.C.A. 7th). In that case two individuals organized a corporation with a capital stock of $5,000. One of the individuals acquired a Ford automobile dealer's contract which cost him nothing. On June 13, 1918, the company increased its capital stock to $50,000 and issued to the two individuals certificates for the capital stock representing the increase, $45,000, and entered on its books as an asset in the sum of $45,000, the agency contract mentioned. The court referred to Section 331 of the 1918 Act which is similar to the same provision in the 1921 Act and said (p. 358):

> * * * it follows from the statute that the elimination of the item of $45,000 from petitioner's invested capital was correct.

> The contract cost the assignors nothing; it was assigned to petitioner subsequent to March 3, 1917. Consequently no credit for invested capital on account thereof could stand, and the respondent rightfully refused such allowance.

See also *Symington-Anderson Co.* v. *Commissioner,* 33 F. (2d) 372 (App.D.C.); *W. A. Sheaffer Pen Co.* v. *Commissioner,* 41 F. (2d) 117 (App.D.C.).

Petitioner contends that the cost of the contract to the previous owner was $640,000 and that this amount should be included in petitioner's invested capital. It is stated that Milliron, the previous owner, received the contract from Faris and Walker as a gift. Petitioner then points to Section 202 (a) (2) which provides that in the case of property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition. The argument is made that as the gift was received prior to December 31, 1920, the cost of the gift to Milliron was its fair market value, $640,000, on the date of acquisition. In other words, petitioner construes "cost of acquisition" as used in Section 331 to mean "value" as used in Section 202 (a) (2).

However, Section 331 deals exclusively with invested capital and is a limitation upon the term as defined in Section 326. It was designed to prevent inflation of invested capital through reorganiza-

tions or other changes of legal ownership where the control of the property remained in the same persons. It clearly and unambiguously limits the value of property in such cases to the cost to the previous owner. To substitute value for cost would defeat that purpose and would result, as the Board said, in legislation rather than a construction of the statute. Furthermore, Section 331 appears in the Act under Title III, War-Profits and Excess-Profits Tax for 1921, while Section 202 (a) (2) appears under Title II—Income Tax. Under the former we are dealing with a term which is purely statutory, strictly limited as to its meaning, for the determination of profits taxes. Under the latter we are dealing with the basis for determining a gain or loss for income tax purposes. It has nothing to do with the computation of invested capital and no intention is disclosed in Section 331 to permit the basis for determining a gain or loss on the sale of a gift to be used as the measure of the amount to be included in invested capital. Petitioner cites no authorities to support such contention and none can be found.

II

Petitioner is not entitled to any depreciation for 1926 in the value of the lease

Petitioner contends that the base for determining the deduction for depreciation in the value of its leasehold for 1926 is $640,000. It is submitted that since the previous owner paid nothing for the

leasehold no such base is permissible under the applicable sections of the statute.

Under Section 204 (c) the basis upon which depletion, exhaustion, and obsolescence are to be allowed in respect of any property is the same as is provided in subdivision (a) for the purpose of determining gain or loss upon the sale of such property. Section 204 (a) provides that the basis for determining gain or loss from the sale of property acquired after February 28, 1913, is the cost of such property except (subdivision 4) that if the property was acquired by gift on or before December 31, 1920, the basis is the fair market value of such property at the time of acquisition. Subdivision (8) of the same Section provides that if the property was acquired after December 31, 1920, by a corporation by the issuance of its stock in connection with a transaction described in Section 203 (b) (4) (and the present is such a transaction), then the basis is the same as it would be in the hands of the transferor. Hence it will be noticed that if the assignment of the contract was a gift from Faris and Walker to Milliron, the transferor of the petitioner, Section 204 (a) (4) applies and it would be necessary to determine the fair market value of the contract on November 2, 1920, since it would be the basis for the computation of the depreciation allowance. Petitioner claims a market value on that date of $640,000. If, however, it was not a gift, the basis for computing

depreciation must be the cost to Milliron which was nothing.

Petitioner agrees that a gift is a transfer of property without consideration but denies that the transfer to Milliron involved any consideration. The letter of Faris and Walker of November 2, 1930, to Milliron clearly states a consideration as follows (R. 54):

> In consideration of your assuming all of the duties and obligations imposed upon us by reason of our contract * * *, we hereby give and assign to you all our right, title, and interest in said agreement, it being understood that you are to assume all of our obligations either directly or indirectly imposed as a result of this agreement.

Milliron's letter of the same date to Faris and Walker states (R. 54):

> Your gift to me today of your contract of November 1st to execute a lease * * *, is hereby accepted and I agree to assume all your obligations thereunder and to hold you free and clear of any liabilities as a result thereof.

Thus the assignee agreed to assume and discharge all the obligations of the assignors. This constituted a valuable consideration moving from the assignee to the assignors. The relief of the assignors from the burdens of the contract by the promise of the assignee prevented the assignment from being a gift. *Jameson* v. *Shepardson,* 83 Cal.

App. 596. The transaction has none of the indicia of a gift. It is true that not every agreement by an assignee to assume and discharge the obligations of an assignor imports consideration, particularly where the burdens assumed are only incidental to the rights given and entail no possibility of a loss. Here the obligations were not merely incidental to the rights conveyed, and the possibility of a loss sustained by the assignee may not be entirely disregarded. The giving of the promise, though legally enforceable, so as to constitute valid consideration does not entail a cost for tax purposes. Not being a gift, the basis for amortizing the contract is limited to the cost of acquisition and that cost was nothing.

III

The question whether rentals paid by lessee from January 2 to May 18, 1921, constituted income to the petitioner is a new issue and may not be raised on appeal

After the Board of Tax Appeals had filed its findings of fact and opinion, respondent and petitioner submitted recomputations of the amount of the deficiencies under the Board's report as provided by Rule 50 of the Board's Rules of Practice. In petitioner's recomputation the claim was made for the first time that the rentals paid by the lessee from January 2 to May 18, 1921, did not constitute income to the petitioner. This was a new issue. Under Rule 50 no new issue may be raised and urged on a hearing upon the recomputation of the

deficiency. *Bankers Pocahontas Coal Co.* v. *Burnet,* 287 U.S. 308; *Davison* v. *Commissioner,* 60 F. (2d) 50 (C.C.A., 2d).

CONCLUSION

It is submitted that the Board's decision is correct and should be affirmed.

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FEBRUARY 1934.

APPENDIX

REVENUE ACT OF 1921, C. 136, 42 STAT. 227

SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; * * *

* * * * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift.

SEC. 331. That in the case of the reorganization, consolidation, or change of ownership of a trade or business, or change of ownership of property, after March 3, 1917, if an interest or control in such trade or business or property of 50 per centum or more remains in the same persons, or any of them, then no asset transferred or received from the previous owner shall, for the purpose of determining invested capital, be allowed a greater value than would have been allowed under this title in computing the invested capital of such previous owner if such asset had not been so transferred or received: *Provided,* That if such previous owner was not a corporation, then the value of any asset so transferred or received shall be taken at its cost of acquisition (at the date when acquired by such previous owner) with proper allowance for depre-

ciation, impairment, betterment or development, but no addition to the original cost shall be made for any charge or expenditure deducted as expense or otherwise on or after March 1, 1913, in computing the net income of such previous owner for purposes of taxation.

REVENUE ACT OF 1926, C. 27, 44 STAT. 9

SEC. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

* * * * *

(b) (4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange (U.S.C.App., Title 26, Sec. 934).

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(4) If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition;

* * * * *

(8) If the property (other than stock or securities in a corporation a party to a reorganization) was acquired after December 31, 1920, by a corporation by the issuance of its stock or securities in connection with a transaction described in paragraph (4) of subdivision (b) of section 203 (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money in addition to such stock or securities), then the basis shall be the same as it would be in the hands of the transferror, increased in the amount of gain or decreased in the amount of loss recognized to the transferror upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, * * * (U.S.C. App., Title 26, Sec. 935).

Rules of Practice Before the United States Board of Tax Appeals

RULE 50.—SETTLEMENT

When the Board determines the issues in any proceeding and withholds decisions of the deficiency or overpayment for later computation, the parties shall, if they are in agreement as to the amount of the deficiency or overpayment, in accordance with the report of the Board, file with the Board an original and two copies of a com-

putation showing the amount for entry of decision forthwith. If the parties are not in agreement as to the amount to be entered in the decision, either of them may file with the Board a computation of the deficiency or overpayment believed by him to be in accordance with the report of the Board. The clerk will serve copy thereof upon the opposite party and will thereupon place the matter upon the day calendar for hearing in due course and give the usual notice. If the opposite party fails to file objection, accompanied by an alternative computation, within five days prior to the date of such hearing, or any continuance thereof, the deficiency or overpayment shown in the computation already submitted shall be taken to be correct and decision thereon will be entered. If the parties submit different computations and amounts, they will be afforded an opportunity to be heard thereon on the date fixed, and the Board will determine the correct deficiency or overpayment and enter decision.

Any hearing under this rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This rule is not to be regarded as affording an opportunity for rehearing or reconsideration.

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